No. 95-888

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

ESTATE OF FRANK MORGAN, SHERMAN DREISESZUN, LELAND GERHART, I. I. OZAR, RAYMOND GIFFORD, HARRY S. JONAS, ESTATE OF RALPH E. KIENE, RANDALL M. NAY, TONY SALAZAR, AND PHILIP PISTILLI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

EUGENE I. PAVALON
GEOFFREY L. GIFFORD
PAVALON & GIFFORD
Suite 1600
Two North LaSalle Street
Chicago, Illinois 60602
(312) 419-7400

ROBERT F. COLEMAN
Counsel of Record
KENNETH PHILIP ROSS
EUGENE J. SCHILTZ
ROBERT F. COLEMAN & ASSOCIATES
5310 Three First National Plaza
Chicago, Illinois 60602
(312) 444-1000

Counsel for Petitioner

February 7, 1996

TABLE OF AUTHORITIES

Cases ***Pages***

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REPLY TO BRIEF IN OPPOSITION

Respondents' opposition to a grant of certiorari rests on two assertions: that the first question involves only "narrow issues concerning a special federal removal statute applicable to the Resolution Trust Corporation," Opp. at 7, and that the second question involves only KPERS' "disagreement with the court of appeals' interpretation of state law." Opp. at 10. Both assertions are incorrect. The issues actually raised by the petition are both worthy of this Court's attention.

1. Respondents miss the point in treating the first question presented as if it involves only a narrow issue about the precise meaning of the particular RTC removal provision in this case, 12 U.S.C. § 1441a (*l*)(3)(A), and in focusing on a defense of *the merits* of the Eighth Circuit's interpretation of Section 1441a (*l*)(3)(A). Opp. at 7-9. Quite apart from the fact that the Eighth Circuit's analysis of this provision is inconsistent with how three other circuits have analyzed it, *see* Pet. at 11 & n.7 — a point that respondents simply ignore — the petition raises a broad issue of federal statutory construction relevant to a wide range of cases. We briefly restate that issue so that it does not become lost in respondents' analysis.

The main issue raised by the petition "is broadly jurisprudential: this Court needs to clarify the precedential force of its decisions in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and *Ferens v. John Deere Co.*, 494 U.S. 516 (1990)," to decide whether "*Van Dusen* should be read as establishing a baseline presumption that, unless the text or legislative history requires a contrary conclusion, all statutes authorizing inter-court changes of venue, not just [28 U.S.C. §] 1404(a), must be construed" so that a change of law is not provided to a defendant as a bonus for a change of venue. Pet. at 8-9. As pointed out in the petition, Judge Easterbrook, in an opinion for the Seventh Circuit, has advocated the use of this presumption for statutory interpretation, citing the wide range of cases that raise *Van Dusen* issues. Pet. at 9-10. Opinions by Justice Scalia and Justice (then-Judge) Ginsburg have also taken a broad view of the applicability of *Van Dusen*. Pet. at 9, 10-11.

Although respondents make an effort to defend the Eighth Circuit's decision on the merits, characterizing *Van Dusen* as a narrow decision, they do not and cannot deny that if *Van Dusen* is read to create the presumption for statutory interpretation advocated

by KPERS, the Eighth Circuit's analysis could not withstand such a presumption, and KPERS would automatically prevail on its argument that Section 1441a (*l*)(3)(A) does not authorize a change in the applicable law. Thus, this case is an ideal candidate for review of the broad jurisdictional issue identified by KPERS, which is of relevance to a wide range of cases and which does not require analysis of either the facts of this case or of the particular legislative history of Section 1441a (*l*)(3)(A) (which, as the Eighth Circuit admitted, is silent on this issue, *see* Pet. at 7). This Court should grant certiorari on this issue and should set it down for full briefing and argument.

2. On the second question, summary reversal is warranted. Respondents concede, through their silence, that the Eighth Circuit, sitting in this diversity case and duty-bound to construe Kansas law as would the Supreme Court of Kansas, improperly ignored a rule of Kansas law established "since at least 1862 that an amended statute of limitations, without any retroactivity language at all, automatically applies to claims that have accrued but have not yet been barred." Pet. at 13. In refusing to apply K.S.A. § 60-522(c) to this case, the Eighth Circuit left Section 60-522(c) with *no valid applications*, thus rendering it "a nullity, violating settled principles of Kansas law." *Id.* Further, respondents concede that this lawsuit involves "a matter of enormous importance to the government of the State of Kansas," as it was brought by the Attorney General of Kansas, on behalf of state employees, to recover $65 million in retirement funds that were lost as a result of alleged fraud by respondents and other defendants. Pet. at 2, 13.

In light of these concessions, this is plainly one of those admittedly rare and exceptional cases in which this Court should exercise its supervisory power to enforce the requirement under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948), that federal courts conscientiously apply the law laid down by the appellate courts of each State. This Court should vacate the judgment below and remand the case to require the Eighth Circuit to give a construction to Section 60-522(c) that does not render it a nullity, which can be readily done by applying it to all cases pending when it was enacted, including this case.

CONCLUSION

For all these reasons, and for the reasons set forth in the petition, certiorari should be granted.

Respectfully submitted,

EUGENE I. PAVALON
GEOFFREY L. GIFFORD
PAVALON & GIFFORD
Suite 1600
Two North LaSalle Street
Chicago, Illinois 60602
(312) 419-7400

ROBERT F. COLEMAN
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